71-1604

No. .....

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MICHAEL RODAK,

IN THE

Supreme Court of the United States

..... Term of 19.....

PORT OF HOUSTON AUTHORITY OF HARRIS COUNTY, TEXAS,

Petitioner,

v.

INTERNATIONAL ORGANIZATION OF MASTERS, MATES AND PILOTS, AFL-CIO, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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TABLE OF CONTENTS

	PAGE
Opinions Below	1
Jurisdiction	1
Questions Presented	2
Statute and Treaty Involved	2
Statement	2
ARGUMENT:	
1. Where American merchant seamen peacefully picket foreign vessels, protesting loss of job opportunities here in the United States, to such vessels, and substandard wages or substandard conditions aboard such vessels, such activities constitute a "labor dispute", within the meaning of the Norris-LaGuardia Act. Federal Courts have no jurisdiction to grant injunctions in labor disputes	4
2. This Court's decision in *Marine Cooks & Stewards* v. *Panama S.S. Co.*, 362 U.S. 365 (1960), requires no reconsideration	6
3. There is no basis in fact or law to warrant extreme judicial surgery so as to carve out an exception to Norris-LaGuardia's proscriptions, to accommodate a Treaty provision and thus put Federal Courts back in the injunction business in labor disputes	9
CONCLUSION	14
CERTIFICATE OF SERVICE	15

Table of Cases

PAGE

Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, 391 U.S. 308 (1968) 14n

Avco Corp. v. Aero Lodge 735, 390 U.S. 557 (1968) .. 10

Benz v. Compania Naviera Hidalgo, 353 U.S. 138 (1957) 5, 6, 7n

Boys Markets, Inc. v. Retail Clerk's Union Local 770, 398 U.S. 235 (1970) 8, 9, 10, 11, 12

Edwards v. Pacific Fruit Express, 390 U.S. 538 (1968) 8

Grain Elevators Flour & Feed Mill Wkrs., etc., NLRB 376 F. 2d 774 (D. C. Cir. 1967) 6

Incres Steamship Co. v. International Maritime Workers Union, 372 U.S. 24 (1963) 7

Local 1967 Carpenters v. N.L.R.B., 357 U.S. 93 (1958) 9

Madden v. Grain Elevators Flour & Feed Mill Wkrs., etc., 334 F. 2d 1014 (7 Cir. 1964) 6

Marine Cooks & Stewards v. Panama S.S. Co., 362 U.S. 365 (1960) 2, 3, 4, 5, 6, 7, 7n, 8, 13

McCulloch v. Sociedad National, etc., 372 U.S. 10 (1963) 8

NLRB v. Nash Finch Co., 404 U.S. 138, 92 S. Ct. 373 (1971) 7

Sinclair Refining Co. v. Atkinson, 370 U.S. 195 .... 9, 10

PAGE

Steel Workers v. Bouligny, 382 U.S. 153 (1967) ... 8

Textile Worker's Union of America v. Lincoln Mills, 353 U.S. 488 (1957) 9, 10

Statutes

Clayton Act, 29 U.S.C. Sec. 52:
Section 20 5

National Labor Relations Act, 49 Stat. 449, as amended:

29 U.S.C. Section 151, 158(b)(4) 6

29 U.S.C. Section 160(1), Section 10(1) 7, 7n

29 U.S.C. Section 185a, Section 301(a) 9, 10, 12

Norris-LaGuardia Act, 29 U.S.C. Section 101 et seq. 2, 3, 4, 6, 7, 8, 9, 10, 11, 12, 13, 14n

Treaty

Treaty of Friendship, Commerce and Navigation, between The United States of America and Liberia, 54 Stat. 1739 2

Other Authorities

F. Frankfurter & N. Greene, The Labor Injunction (1930) 9n

U. S. Dept. of Commerce Publication, Maritime Administration, MARAD 1970 U. S. Govt. Printing Office Stock No. 0307-0021, Chart VI, p. 27 ..... 4n

U. S. State Dept., publication Treaties in Force—A List of Treaties and Other International Agreements of the United States, edition dated October 31, 1955 ..... 13n

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BRIEF FOR RESPONDENTS IN OPPOSITION

Opinions Below

The opinion of the District Court (App. A-1 of Petition) was not officially reported. The opinion of the Court of Appeals for the Fifth Circuit (App. A-2 to 8) is reported at 456 F. 2d 50.

Jurisdiction

The alleged jurisdiction requisites are set forth in the Petition.

Questions Presented

1. Whether the Court below erred in concluding it had no jurisdiction to issue an injunction enjoining respondents' activities, by virtue of the provisions of the Norris-LaGuardia Act, 29 U.S.C. Section 101 et seq.

2. Whether this Court's decision in *Marine Cooks & Stewards* v. *Panama S.S. Co.*, 362 U.S. 365 (1960), should be reconsidered.

3. Whether, upon such reconsideration, an exception to the Norris-LaGuardia Act should be carved out, premised upon accommodation to foreign treaty provisions, so as to authorize Federal Courts to issue injunctions against informational peaceful picketing of foreign vessels by American merchant seamen, not interested in the vessel's internal economy, but rather in preserving job opportunities for themselves in the United States.

Statute and Treaty Involved

The Norris-LaGuardia Act, 29 U.S.C., Section 101 et seq., and the Treaty involved, are set forth in the Petition (App. B-20 to 28 and App. B-2 to 19).

Statement

This litigation concerns activities of six defendant American maritime unions, representing American merchant seamen. Members of such unions in the Port of Houston, Texas, established picket lines consisting of four pickets at three of forty-nine docks in the Port of Houston. The three vessels picketed, The Eastern Glory, The Ilkon Tak, and The St. Nicholas, were all flying the Liberian Flag.

The American seamen pickets carried placards and also handed out literature as set forth in the petition (App. C-1-2). Their effort was to call the attention of the public to the declining job opportunities for American merchant seamen caused by the use of foreign vessels, and to the substandard wages and working conditions on such vessels. The public was asked not to patronize the picketed vessels and other workers refused to cross the picket lines and work on the three picketed vessels. It is conceded that there was no intent to organize or represent the foreign crews of the picketed vessels (Petition, 4). The Petitioner, Port of Houston Authority of Harris County, Texas, is an American employer, operating the docks where the picketed vessels were berthed.

The petitioner brought an action seeking injunctive relief against respondent unions on the ground that such peaceful picketing violated the laws and treaties of the United States, and was an undue burden and interference with foreign relations and foreign commerce. The District Court denied petitioners' request for a temporary restraining order and after hearing, denied petitioner's request for a preliminary injunction, citing this Court's decision, *Marine Cooks & Stewards* v. *Panama S.S. Co.*, 362 U.S. 365 (1960), applying the proscriptions of the Norris-LaGuardia Act. The Court of Appeals for the Fifth Circuit affirmed, and in its opinion, rejected petitioner's attempt to carve out an exception to said Norris-LaGuardia Act, premised upon the purported grounds of accommodation of such Act to treaty provisions between our Country and Liberia.

ARGUMENT

1. Where American merchant seamen peacefully picket foreign vessels, protesting loss of job opportunities here in the United States, to such vessels, and substandard wages or substandard conditions aboard such vessels, such activities constitute a "labor dispute", within the meaning of the Norris-LaGuardia Act. Federal Courts have no jurisdiction to grant injunctions in labor disputes.

As the Fifth Circuit at bar held (456 at 53):

> "The Norris-LaGuardia Act restriction on the power of Federal Courts to issue injunctions in labor disputes is virtually intact after 40 years".

Nor can there be any peradventure of doubt, that the activities about which the petitioner complains, constitute a labor dispute within the meaning of the Norris-LaGuardia Act. This Court's decision resolved the latter issue twelve years ago, in *Marine Cooks & Stewards* v. *Panama S.S. Co.*, 362 U.S. 365 (1960).

The facts at bar and those in *Marine Cooks, supra,* are virtually identical, the sole and immaterial difference being the mechanical means used for the picketing. At bar, it was on foot, patrolling at the vessel. In *Marine Cooks, supra,* it was by picket boat patrolling around the vessel.

In both *Marine Cooks, supra,* and at bar, the peaceful picketing protested American merchant seamen loss of job opportunities here in the United States to foreign vessels,[1] and to the substandard wages and working condi-

[1] U. S. Department of Commerce Publication, Maritime Administration, MARAD 1970 U. S. Govt. Printing Office Stock No. 0307-0021, Chart. VI p. 27. Said Chart illustrates that in 1947 U. S. commercial seaborne cargo was 142.2 million tons. In 1969 such U. S. commercial seaborne cargo increased to 427.9 million tons,

tions aboard such vessels, lawful conduct as this Court said in *Marine Cooks* (362 at 371), under Section 20 of the Clayton Act, 29 U.S.C. Sec. 52.

Respondent's lawful activities may not be converted to unlawful conduct, as the petitioner suggests, citing *Benz* v. *Compania Naviera Hidalgo,* 353 U.S. 138 (1957), because of the adverse effect such lawful picketing activities may have on the internal discipline of the picketed foreign vessels. For as this Court stated in *Marine Cooks, supra* (362 at 371):

> "Nor does the language of the Norris-LaGuardia Act leave room to hold that jurisdiction it denies a District Court to issue a particular type of restraining order can be restored to it by a finding that the nonenjoinable conduct may 'interfere in the internal economy of a vessel registered under the flag of a friendly foreign power.'" [12]

[12] Unlike the situation in the Benz case, in which American unions to which the foreign seamen did not belong picketed the foreign ship in sympathy with the strike of the foreign seamen aboard, the union members here were not interested in the internal economy of the ship, but rather were interested in preserving job opportunities for themselves in this country. They were picketing on their own behalf, not on behalf of the foreign employees as in Benz. Though the employer here was foreign, the dispute was domestic.

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a 300% increase in 22 years. In contrast to such increase of seaborne U. S. commercial cargo, are the following statistics reflecting substantial loss of employment opportunities for American merchant seamen. In 1947 U. S. merchant vessels carried 57.6% of such U. S. commercial seaborne cargo. In 1969, a period spanning 22 years, the percentage of U. S. commercial seaborne cargo carried by U. S. Flag vessels was decreased to 4.8%. Conversely, such figures demonstrate that foreign flag vessels increased their percentage of transporting U. S. commercial seaborne cargo from 42.6% in 1947 to 95.2% in 1969.

Most significant, as distinguished from *Benz, supra,* but identical with *Marine Cooks, supra,* at bar, the respondent unions did not intend or seek to organize or represent the foreign seamen on the picketed foreign vessels. Petitioner so concedes (Pet. p. 4). Nor was respondents' picketing on behalf of the foreign crewmen as in *Benz, supra.* On the contrary, American merchant seamen here were picketing solely in their own behalf (fn. 1 *supra*), and as the Fifth Circuit at bar held (456 at 51):

> "The Port Authority seems to concede the fact of a labor dispute within the scope of the act."[1] (footnote omitted)

It is clear by the foregoing, that present at bar is a labor dispute within the meaning of the Norris-LaGuardia Act. Under long established statutory and decisional law, the Court below was correct in concluding that no injunctive relief may issue. By virtue of the above, review of the foregoing issue by this Court is unwarranted.

2. This Court's decision in *Marine Cooks & Stewards* v. *Panama S.S. Co.*, 362 U.S. 365 (1960), requires no reconsideration.

Initially, it must be noted that petitioner, as an American employer, has available for utilization the exclusive Congressional scheme for resolution of a labor dispute in Port of Houston, Texas. National Labor Relations Act, 49 Stat. 449 as amended, 29 U.S.C. Section 151, 158(b)(4). *Benz, supra* (at 143 fn. 5); *Madden* v. *Grain Elevators Flour & Feed Mill Wkrs., etc.*, 334 F. 2d 1014 (7 Cir. 1964); *Grain Elevators Flour & Feed Mill Wkrs., etc.* v. *NLRB*, 376 F. 2d 774 (DC Cir. 1967).

Equally significant, is that remedies for violation of the proscriptions of Section 8(b)(4) of such Labor Act, "in

circumstances unrelated to its employer-employee relations", such as at bar, is available to any person. *Incres Steamship Co.* v. *International Maritime Workers Union,* 372 U.S. 24, 27 (1963). And whether the conduct complained of by the petitioner, or any other person involving circumstances unrelated, "to its employer-employee relations", is unlawful, must be determined by " * * * our laws and jurisdiction as they exist". *Marine Cooks & Stewards, supra* (at 372).[2] For under our laws, such aforesaid conduct complained of may be protected, prohibited or left to the free play of the economic forces. *NLRB* v. *Nash Finch Co.,* 404 U.S. 138, 92 S. Ct. 373, 377 (1971). Only after a determination has been made of the complained of conduct and if found proscribed, may the restrictions of Norris-LaGuardia be lifted and then only by the NLRB, as provided in the aforesaid National Labor Relations Act as amended, 29 U.S.C. Sec. 160(1), Sec. 10(1).[3]

In substance, petitioner herein is seeking to by-pass the foregoing elaborate Congressional scheme and arrogate unto itself the insulation from the provisions of the Norris-LaGuardia Act, which, however, is solely the right and province of the National Labor Relations Board under warranted circumstances.

Request for reconsideration of a long standing decision of this Court, of necessity brings into play the doctrine of

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[2] The foregoing concept applies equally to foreign vessels berthed within our territorial limits. As this Court said in *Benz, supra* (at 142, 143), and reaffirmed in *Marine Cooks, supra* (at 372); "It is beyond question that a ship voluntarily entering the territorial limits of another country subjects itself to the laws and jurisdiction of that country. Wildenhaus Case, 1887, 120 U.S. 1, 7 S. Ct. 385, 30 L. Ed. 565". (*Benz* at 142).

[3] The issue of preemption, provided for in the National Labor Relations Act as amended, supra, raised by respondents in the District Court, was found unnecessary by the Court to be passed upon, the Court finding absence of jurisdiction of the action by virtue of Norris-LaGuardia provisions.

stare decisis. It must be further pointed out that *Marine Cooks & Stewards, supra,* holding, its rationale and thrust in facts and circumstances identical to those at bar, was reiterated by this Court in *McCulloch* v. *Sociedad National, etc.,* 372 U.S. 10, 18 (1963).

As this Court said in *Boys Markets Inc.* v. *Retail Clerk's Union Local 770,* 398 U.S. 235 (1970), relative to the doctrine of *stare decisis* (at 240), " • • • important policy considerations militate in favor of continuity and predictability in the law". And although said doctrine does not command blind adherence to the Court's latest decision, adherence nevertheless, should be so had unless its observance, " • • • involves a collision with a *prior* doctrine more embracing in its scope, intrinsically sounder and verified by experience" (398 at 241) (emphasis added). The petitioner at bar has not shown, for none exists, any prior doctrine to this Court's decision in *Marine Cooks, supra,* which would require the by-passing of the *stare decisis* principle, let alone a showing and proof of such a prior doctrine more embracing in scope, intrinsically sounder and verified by experience. On the contrary, on the issue of experience alone, there has been no such experience and the record is devoid of the same.

Further to be considered is the fact, as the Fifth Circuit found, Norris-LaGuardia's proscriptions have stood virtually intact for 40 years. Said Act, its history and experience is a clear expression of the legislature for two score years, an acknowledgment of its sound legislative object. This Court, in comparable instances, has carefully expressed its judicial deference to the legislature in areas such as present at bar, where the latter is preeminent, and an acknowledgment that any other course would constitute judicial usurpation. *Edwards* v. *Pacific Fruit Express,* 390 U.S. 538 (1968), *Steel Workers* v. *Bouligny,* 382 U.S. 153 (1967).

Furthermore, as this Court has enunciated, labor legislation such as the Norris-LaGuardia Act, is the Congres-

sional distillation of "strong contending forces and deeply held views" of the populous. *Local 1967 Carpenters* v. *N.L.R.B.*, 357 U.S. 93 (1958). Such legislation constitutes the legislative resolution of such views, and to overrule or modify the results of such distillation, would manifest the strongest demonstration of the rejected concept of judicial usurpation of the legislative functions of government. For, if Norris-LaGuardia is to be repealed, modified or amended, such efforts must be directed to Congress, not to this Court, as petitioner improperly is seeking to do.

3. There is no basis in fact or law to warrant extreme judicial surgery so as to carve out an exception to Norris-LaGuardia's proscriptions, to accommodate a Treaty provision and thus put Federal Courts back in the injunction business in labor disputes.[4]

Petitioner's alleged authority for the requested extreme judicial surgery is premised upon this Court's *Boys Markets* decision, *supra*. Petitioner's reliance thereon is wholly unfounded as the following analysis of the *Boys Markets* decision and rationale demonstrates.

This Court, in *Boys Markets, supra*, was presented with the issue of reexamining its *Sinclair Refining Co.* v. *Atkinson* holding, 370 U.S. 195 (1962), that Norris-LaGuardia's anti-injunction provisions precluded federal courts from enjoining a strike in breach of a collective bargaining agreement's no strike provision, even though contractual provisions were therein contained, enforceable under Section 301(a) of the Labor Management Relations Act of 1947, for binding arbitration of the grievance over which the strike was called.

This Court at the threshold of its *Boys Markets* decision, made clear that its prior *Textile Worker's Union of*

[4] F. Frankfurter & N. Greene, The Labor Injunction (1930).

America v. *Lincoln Mills,* 353 U.S. 488 (1957) holding was to fashion substantive and procedural aspects of "federal labor *contract law.*" The Court found that the anti-injunction provisions of the Norris-LaGuardia Act did not prohibit the type of relief there proposed, and noted that "refusal to arbitrate (the issue in Lincoln Mills) was not part and parcel of the abuses against which the Act was aimed", and furthermore, "the Act itself manifests a policy determination that arbitration should be encouraged". (398 at 242)

The *Boys Markets* Court pointed out, that its subsequent decisions fashioning such federal contract labor law, "emphasized the importance of arbitration as an instrument of federal policy for resolving labor disputes between labor and management * * *" (at 243), and the effects upon federal contract labor law of its *Avco Corp.* v. *Aero Lodge,* 735, 390 U.S. 557 (1968) decision authorized such labor contract actions brought in state courts, to be removed to the federal forum wherein the *Sinclair* decision precluded the enforcement of the agreed upon contractual bargain (at 244). It viewed its *Avco* decision in the context of its *Sinclair* decision, taken in conjunction with *Lincoln Mills* and its progeny, to have produced an anomolous situation, which in effect frustrated the very provisions of the law (Section 301(a) N.L.R.A. as amended), which Congress clearly intended to apply for breaches of collective bargaining agreements and which the parties themselves had agreed to in advance.

This Court emphasized throughout its *Boys Markets* decision that in its accommodation of Norris-LaGuardia with the aforesaid subsequently enacted Section 301(a), there was no central issue inconsistent with the purposes of such enactments. On the contrary, it stated (at 252):

> "* * * the central purpose of Norris-LaGuardia Act to foster the growth and viability of labor organizations is hardly retarded—if anything, this goal

is advanced—by a remedial device that merely enforces the obligation that the union freely undertook under a specifically enforceable agreement to submit disputes to arbitration.[22] * * *"

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[22] As well stated by the neutral members of the A.B.A. Sinclair committee:

"Any proposal which would subject unions to injunctive relief must take account of the Norris-LaGuardia Act and the opposition expressed in that Act to the issuing of injunctions in labor disputes. Nevertheless, the reasons behind the Norris-LaGuardia Act seem scarcely applicable to the situation * * * (in which a strike in violation of a collective-bargaining agreement is enjoined). The Act was passed primarily because of widespread dissatisfaction with the tendency of judges to enjoin concerted activities in accordance with 'doctrines of tort law which made the lawfulness of a strike depend upon judicial views of social and economic policy.' (Citation omitted.) Where an injunction is used against a strike in breach of contract, the union is not subjected in this fashion to judicially created limitations on its freedom of action but is simply compelled to comply with limitations to which it has previously agreed. Moreover, where the underlying dispute is arbitrable, the union is not deprived of any practicable means of pressing its claim but is only required to submit the dispute to the impartial tribunal that it has agreed to establish for this purpose. A.B.A. Sinclair Report 242."

How petitioner squares the aforesaid central and crucial ***Boys Markets*** holding, *supra*, with its rapacious attempt to emasculate Norris-LaGuardia, frankly escapes us.

Would petitioner's action at bar, if successful, comport with the aforesaid "central purpose of the Norris-LaGuardia Act to foster the growth and viability of labor organizations"? Would such central purpose "this goal", be advanced? To the contrary, the respondent unions' growth and viability have been most seriously affected (fn. 1 *supra*). In effect, petitioner now seeks to render its *coup de grace* to the remnants of such viability. And

to accomplish such rapacious result, it asks this Court to totally disregard the clear, expressed aforesaid Congressional central purpose of the Norris-LaGuardia Act, and instead, through the euphemism of "accommodation", to lay waste to a crucial statute which has remained virtually intact nigh these past forty years. And, have the respondent unions here, as in *Boys Markets*, "freely undertook", to be subject to injunctions? The answer is clearly in the negative.

This Court obviously recognized that attempts such as petitioners' efforts at bar, may perforce be utilized to expand upon its *Boys Markets* holding, contrary to clear Congressional intent. For this Court, in concluding its discussion in *Boys Markets* specifically stated (at 253):

> "Our holding in the present case is a narrow one. We do not undermine the vitality of the Norris-LaGuardia Act. We deal only with the situation in which a collective-bargaining contract contains a mandatory grievance adjustment or arbitration procedure. Nor does it follow from what we have said that injunctive relief is appropriate as a matter of course in every case of a strike over an arbitrable grievance."

Petitioner, in pursuing its accommodation theory and attempting to track it with this Court's *Boys Markets* holding, contends that as in *Boys Markets* the Liberian Treaty, similar to Section 301(a) aforesaid, came into existence subsequent to the enactment of Norris-LaGuardia (Pet. pp. 11-12). And, the unfounded argument proceeds, the Treaty obligation provides for free access to "all" ports of the contracting parties. Petitioner then states that the Norris-LaGuardia anti-injunction provisions, frustrate this subsequent Treaty, and therefore, as in *Boys Markets*, the Act should be accommodated to the Treaty. The ready answer to such argument is that *Boys Markets*, as shown above, is no authority for the facts at

bar so as to warrant any accommodation. Additionally, although the Liberian Treaty arose subsequent to Norris-LaGuardia, nevertheless, as petitioner admits (Pet. p. 11), at the time of the passage of the Act, there were in effect, and had been in effect throughout our history, similar treaties providing for comparable free access to all ports, a fact well known to Congress at that time and to this Court when it rendered its *Marine Cooks & Stewards* decision, *supra*.[5]

Finally, Liberian vessels have free access to all our ports under our treaties. Free access does not, however, insulate foreign nations from the application of the laws of the nation where the port is located, for as this Court has stated, *supra*, "a ship voluntarily entering the territorial limits (of our country), subjects itself to the laws and jurisdiction of (our country)". One of such laws of seasoned vintage, virtually intact, is Norris-LaGuardia with its anti-injunction provisions.

The petitioner, in thunderous rhetoric, laments the vast union economic power which can dictate which nation this country may trade with. Again, petitioner is in error. An examination of federal publications (fn. 1 *supra*) clearly refutes such statement of rhetoric. On the contrary, such power can only objectively be considered to reside with "the other side."

More significant, however, petitioner ignores the fact and conveniently so, that the exercise of lawful informational picketing and handbilling by American merchant seamen, protesting their loss of job opportunities here in

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[5] As to Treaties with friendly nations in force at all times material here, and which provide for "free access to all ports", see U. S. State Department, publication Treaties In Force—A List of Treaties and Other International Agreements of the United States, edition dated October 31, 1955.

the United States to the foreign vessels, is a lawful exercise of basic fundamental First Amendment rights.[6] The exercise of such constitutional rights clearly does not depend upon economics.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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New York, New York, July 13, 1972

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[6] Presented in the District Court as a defense, was that the conduct complained of constituted lawful exercise of First Amendment rights. *Amalgamated Food Employees Union Local 590,* v. *Logan Valley Plaza,* 391 U.S. 308 (1968); peaceful picketing at a location related to the object. The District Court found unnecessary the resolution of such defense, finding no jurisdiction by virtue of Norris-LaGuardia.

Certificate of Service

HOWARD SCHULMAN, attorney for respondents, does hereby certify that on this 13th day of July, 1972, copies of the foregoing brief in opposition was served on the following:

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Attorneys of record for petitioners, by mailing the same to them through the United States mail, postage prepaid.

HOWARD SCHULMAN